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Nos. 79-1738 and 80-945

In the Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD NIXON,
Petitioner,
v.
A. ERNEST FITZGERALD,
Respondent.

BRYCE N. HARLOW and
ALEXANDER P. BUTTERFIELD,
Petitioners,
v.
A. ERNEST FITZGERALD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

and

BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Motion for Leave to File Amicus Curiae Brief on Behalf of Mountain States Legal Foundation as Amicus Curiae in Support of Respondent

Mountain States Legal Foundation respectfully moves this Court, pursuant to Rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed *amicus curiae* brief. In support of this motion, the Foundation states:

1. Mountain States Legal Foundation (the Foundation), is a nonprofit, public interest legal foundation. The Foundation is supported entirely by donations from its members and is dedicated to the legal advocacy of the values and concepts of individual liberties and economic freedom.

2. One of the guiding principles of the Foundation is the need for responsive and responsible government at all levels. To this end, the Foundation has filed suits seeking personal liability of government officials. *Mountain States Legal Foundation v. Andrus,* No. 79-275K (D. Wyo., filed Sept. 20, 1979); *Mountain States Legal Foundation v. Denver School District No. 1,* 459 F. Supp. 357 (D. Colo. 1978); *Campbell v. Arapahoe School District No. 6,* No. 76-M-1069 (D. Colo., May 19, 1981). The Foundation therefore has a significant expertise and interest in the immunity issue found in the instant case.

3. The issue of presidential immunity from personal liability suits is one which affects all citizens interested in a government accountable to the law. The Foundation intends to present to the Court the overriding interests, transcending those of the parties, which compel protecting the President with qualified, rather than absolute, immunity.

For the foregoing reasons, Mountain States Legal Foundation respectfully requests that its motion for leave to file the annexed *amicus curiae* brief, be granted.

Respectfully submitted,

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BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS

The Mountain States Legal Foundation (the Foundation) is a nonprofit, public interest legal center dedicated to addressing in the courts those issues which affect individual liberty and economic freedom. The instant case has great significance and potential for impact on the individual liberty and constitutional rights of all Americans. The Foundation has long pursued a policy of making government at all levels more responsive and responsible by imposing personal liability on those officials who knowingly violate established rights. *Mountain States Legal Foundation v. Andrus,* No. 79-275K (D. Wyo., filed Sept. 20, 1979); *Mountain States Legal Foundation v. Denver School District No. 1,* 459 F. Supp. 357 (D. Colo. 1978); *Campbell v. Arapahoe School District No. 6,* No. 76-M-1069 (D. Colo., May 19, 1981). The issue of presidential immunity is a direct and logical extension of such fundamental Foundation activity.

SUMMARY OF ARGUMENT

In deciding the nature of immunity from personal liability to be accorded the President of the United States, the Court is faced with the culmination of a trend which gained momentum during the last decade. The trend is one which recognized the overriding need to provide a mechanism for redress of individual injury resulting from constitutional violations by federal executive officers. The public policy justifications for establishing personal liability through an implied cause of action for violation of constitutional rights were compelling. The Court now has the opportunity to decide whether the President of the United States occupies a unique position which for constitutional and countervailing policy reasons justifies according the occupant of the Oval Office absolute immunity from personal liability.

It is the position of this *amicus* that, while the President does indeed play a unique role in our governmental structure, such a role does not mandate absolute immunity. Rather, it is entirely proper under the Constitution and relevant public policy considerations to protect the President through a grant of qualified immunity. The key to fair and effective application of such qualified immunity lies in (1) express recognition by this Court of the unique and vital nature of the presidency; and (2) the articulation of a clear procedure and standard of review whereby insubstantial or frivolous lawsuits may be dismissed at the earliest possible stage of the litigation.

This brief will first address the development of the theory of qualified immunity with a focus on the policy considerations. Thereafter, an examination will be made of the special factors which might, but should not, cause this Court to hesitate in subjecting the President to carefully construed personal liability. Finally, a standard of review will be proposed which affords aggrieved parties an opportunity to recover for violation of established constitutional rights, but also recognizes the importance of protecting the President's ability to act decisively and with due confidential deliberation as leader of our nation.

ARGUMENT

I. THE RATIONALE UNDERLYING THE THEORY OF QUALIFIED EXECUTIVE IMMUNITY MANDATES REJECTION OF ABSOLUTE IMMUNITY FOR THE PRESIDENT.

Prior to 1971, federal executive officials were absolutely immune from suits seeking damages arising from acts within the outer perimeter of the officials' authority. *Barr v. Matteo,* 360 U.S. 564 (1959); *Spalding v. Vilas,* 161 U.S. 483 (1896). This executive immunity was judi-

cially created by analogy to those cases which established immunity for judges. *See Barr*, 360 U.S. at 578 (Warren, C.J., dissenting). Its principal justification was articulated by Judge Learned Hand in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949). Judge Hand recognized that anything less than absolute immunity would subject even conscientious officials to suits in which:

> it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

177 F.2d at 581.

In addition to absolute personal immunity, sovereign immunity precluding most claims against the United States further restricted the ability of victims to obtain compensation for damages suffered at the hands of government officials. Thus, in a country of constitutionally limited government, citizens were placed in the curious position of being unable in many cases to vindicate or effectively redress violation of their rights. While the Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1976), provided some relief, insurmountable hurdles remained which frustrated any effort to obtain damages from responsible officials.

In order to remedy this injustice and to deter officials from violating constitutional rights, courts expanded those instances in which officials could be held personally liable for constitutional violations. Personal liability actions were held applicable to federal officials for the first time during the 1970's. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The courts gradually arrived at one theory of immunity for both

federal and state executive officers in such suits, *i.e.* qualified immunity in which the official would be liable if he knew or reasonably should have known that the action taken would violate established constitutional rights or if he acted maliciously to cause constitutional violations. *Butz v. Economou*, 438 U.S. 478 (1978). The stimulus for formulation of one consistent theory was the incongruity of using the United States Constitution to protect citizens from acts by state officials, but not from those by federal officers. *Butz*, 438 U.S. at 504. A similar incongruity would exist if the President is cloaked with absolute immunity while the rest of the executive branch face potential personal liability. The instant case provides the Court with the opportunity to address and prevent this incongruity.

The manner in which the Court reconciled the law and public policy in creating qualified immunity for state and federal officials is relevant to the process it must now undertake in determining the nature of presidential immunity. Beginning with *Bivens*, the Court wrestled with the problem of protecting the constitutional rights of American citizens from violation by federal officials while at the same time preventing paralysis of government through harassing suits. The balance which the Court began to strike was premised upon the explicit recognition that citizens must have some effective means for redress of constitutional violations through common law suits. The power of the Court to provide such redress was based upon the now famous quote from *Bell v. Hood*, 327 U.S. 678, 684 (1946): "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." (*cited with approval in Bivens*, 403 U.S. at 392.)

In the years following announcement of its decision in *Bivens*, the Court attempted to refine the theory of im-

munity in implied constitutional cases against state officials. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Wood v. Strickland*, 420 U.S. 308 (1975). Once qualified immunity was recognized as a valid means of protecting officials while enabling citizens to vindicate their rights, *Scheuer*, 416 U.S. at 247-48, the Court determined that such qualified immunity should be pierced when constitutional rights are violated by an executive official who:

> knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights [of the plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights . . . .

Wood, 420 U.S. at 322.

In *Butz*, the Court established a qualified immunity based on the *Wood v. Strickland* standard for application to federal officials in implied constitutional causes of action. The Court in *Butz* reasoned that express statutory or constitutional limitations on the action of federal officials defined the outer limits of proper activity. *Butz*, 438 U.S. at 489. It recognized that there was no justification, legal or otherwise, which could support permitting federal officials to knowingly violate established rights with impunity. The *Butz* Court quoted with strong approval the premise eloquently set forth in *United States v. Lee*, 106 U.S. 196 (1882), that:

> [n]o man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.

106 U.S. at 220. Indeed, the propriety of this Court recognizing qualified immunity for the President is underscored

by Chief Justice Marshall who wrote: "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

The power and resources as well as the obligations and duties of the President are awesome, but he is still bound by the limts of the Constitution. In light of this, the rationale behind the foregoing cases should support application of carefully delineated qualified immunity to the President, absent "special factors counselling hesitation," *Bivens*, 403 U.S. at 396, since "the greater power of such [an official] affords a greater potential for a regime of lawless conduct." *Butz*, 438 U.S. at 506.

II. THERE ARE NO SPECIAL FACTORS WHICH MANDATE ABSOLUTE IMMUNITY FOR THE PRESIDENT.

A. *Qualified Presidential Immunity Does Not Violate The Separation Of Powers Doctrine.*

The framers of the Constitution sought to frustrate tyranny by dividing the powers of government among three branches of government, the legislative, the executive and the judicial. Article I, section 1 of the Constitution provides that:

> All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

Article II, section 1 of the Constitution provides that:

> The executive Power shall be vested in a President of the United States of America.

Article III, section 1 of the Constitution provides that:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The framers did not include in the Constitution an express separation of powers clause prohibiting one branch from exercising the powers of another. The courts have therefore applied the separation of powers doctrine by developing their own doctrines to define the precise relationship among the branches. *E.g., Springer v. Philippine Islands,* 277 U.S. 189 (1928).

It has been contended that to accord the President anything less than absolute immunity would violate the separation of powers doctrine. *E.g.,* Note, *Presidential Immunity from Constitutional Damage Liability,* 60 B.U.L. Rev. 879 (1980); *see Carlson v. Green,* 446 U.S. 14 (1980). An examination of the pertinent case law, however, reveals that under properly delineated circumstances a qualified immunity is completely compatible with the separation of powers doctrine.

This Court is now faced with an apparent conflict between the executive and judicial branches. In reconciling this apparent conflict it should be remembered that the separation of powers doctrine is not precisely defined or consistently applied. *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635 (1952) (Jackson J., concurring); *Hampton & Co. v. United States,* 276 U.S. 394 (1928); J. Story, *Commentaries on the Constitution* § 525 (5th ed. M. Bigelow 1905). The branches of government have never operated with rigid independence from each other. Rather, a dynamic balance must be struck in each instance which permits government effectiveness while maintaining the institutional integrity of each branch.

The role of the judiciary was clearly established in *Marbury v. Madison,* which held that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) at 177. Under such a mandate the courts have repeatedly established standards of review and determined when either Congress or the President have exceeded constitutional bounds. *E.g., Powell v. McCormack,* 395 U.S. 486 (1969); *Youngstown.* In all such cases it is recognized that a delicate analysis must be made in which the Court does not unduly intrude into the fundamental functions committed to each branch. *Baker v. Carr,* 369 U.S. 186 (1962).

To determine if subjecting the President to personal liability violates the separation of powers doctrine, the Court must engage in the balancing process set forth in *Nixon v. Administrator of GSA,* 433 U.S. 425 (1977):

> In determining whether [an act or policy] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the [acted upon branch] from accomplishing its constitutionally assigned functions . . . . Only where the potential for disruption is present must [the Court] then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of [the acting branch].

433 U.S. at 443.

It is necessary to examine whether Court-created qualified immunity for executive officials, including the President, furthers the constitutional function of the Court. Under the Constitution it is the function of the Court to decide "all cases, in Law and Equity, arising under this Constitution." U.S. Const. art. III, § 2, cl. 1. This has been interpreted to vest the Court with the vital function

of guarding constitutional liberties from infringement by the legistlative or executive branches. *Bivens,* 403 U.S. at 392. The recent case of *Davis v. Passman,* 442 U.S. 228 (1979), recognized this, and cited with approval James Madison's statement made upon presentation of the Bill of Rights:

> If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

442 U.S. at 241-42.

Since the President is the chief of the executive branch, the constitutional function of the judiciary is furthered by preventing unconstitutional acts by the President. Application of qualified, rather than absolute, immunity is entirely consistent with the traditional role of the Court as guardian of the Constitution.

Next, it is necessary to determine if the constitutional functions of the President would be impeded by potential personal liability. The functions of the President are varied under Article II, section 1 of the Constitution. While he should be immune for certain acts [*See* § III, *infra*], no automatic interference with his functions would occur by imposition of clearly delineated qualified immunity. An examination of the traditional justifications for absolute immunity reveals that absolute immunity for most presidential acts is unnecessary. Under the traditional rationale, there were two reasons for absolute immunity: (1) that the potential for personal liability would paralyze effective government and; (2) that it would dissuade even the most

resolute from undertaking government service. *Barr; Gregoire.* These justifications for absolute immunity have been consistently rejected by recent cases which recognized that the vindication of constitutional rights was of paramount significance, and that the potentially negative effects of qualified immunity were outweighed by the sanctity of liberty in our society. *Bivens; Butz.* Indeed, while the number of personal liability suits has risen since *Butz, Halperin v. Kissinger,* 606 F.2d 1192, 1214 (1979) (Gesell, J., concurring), the predicted adverse impact has yet to materialize.

Use of the foregoing concerns to justify absolute immunity for the President also elevates form over substance. Absolute immunity of cabinet members, *Butz,* and advisors, *Halperin,* has already been eroded to a qualified immunity based on the *Wood v. Strickland* standard. The concern of possibly rendering the President indecisive or unable to obtain frank advice from subordinates and advisors thus does not mandate absolute immunity. Any chilling effect on confidential communication is already in existence, and would be arguably greater if subordinates knew that they alone stood to suffer for advocating or carrying out questionable activities. Additionally, the need for confidentiality of presidential communications is respected by the Court. *United States v. Nixon,* 418 U.S. 683, 706 (1974). This respect can be given further substance through properly defined standards for summary judgment. [*See,* § III, *infra*]. Furthermore, to argue that qualified people will spurn the chance to lead the most powerful nation on earth because of personal financial accountability for unconstitutional acts ignores political and social reality.

It is, of course, necessary to recognize the unique status of the President [*See* § III, *infra*], and the fact that what holds true for underlings may not apply with equal validity to the Chief Executive. It may be argued that, of all federal officers, the President must be unfettered in his ability to

execute his duties. To the extent that his ability to perform is impaired by the potential for personal liability, some interference with his constitutional powers occurs. This *amicus* believes that such interference would in practice be minimal.

B. *Public Policy Is Furthered By Qualified Presidential Immunity.*

A clear benefit derived from qualified immunity is that improper conduct is deterred. *Carlson*. This is a benefit which cannot be precisely quantified since it has no historic track record at the presidential level. While the United States has survived admirably for 200 years with apparent absolute presidential immunity, in this age of increasing social complexity and potential for technologically assisted abuse of rights, a new dimension is added to the balancing exercise. Deterrence from unconstitutional conduct becomes ever more crucial.

Another general public policy supporting presidential liability is compensation of the victim. Compensation for injury could conceivably come from officials acting in concert with the President if the President were absolutely immune. However, the injustice of allowing the primary transgressor to go unpunished in some cases, and the potential for reluctance by jurors to fully assess damages against only subordinate officials mitigate against such a restrictive method of compensation.

To charge the President with the responsibility to act within established constitutional limits can in reality preclude or inhibit valid activity only in very rare cases. He may readily avail himself of experienced legal advice and is, "like any other citizen . . . charged with knowledge of established law and must be held accountable for personal misconduct." *Halperin v. Kissinger*, 424 F. Supp. 838, 845 (D.D.C. 1976).

In the vast majority of instances, the President would indeed know what acts were constitutionally permissible and could find an efficacious constitutional option. It begs credibility to assert that he must be free to exercise unconstitutional powers with impunity. The integrity of the governmental structure and the stability of the country must take paramount importance over a theoretical need for maximizing the options available to the President.

In order that the citizens of this country have full constitutional protection, it is necessary for the President to be subject to personal liability for those acts which he knew or reasonably should have known would violate established constitutional rights or where he acted with malicious intent to cause violation of such rights. It is in precisely those instances when a President may deem unconstitutional action more effective or desirable that he must be deterred by potential personal liability. The proper safeguards for the President should come from careful judicial scrutiny that recognizes the unique nature of the presidency and places a commensurate burden on every plaintiff at an early stage of any litigation to meet high threshold requirements or face dismissal.

III. THE PRESIDENT WOULD BE ADEQUATELY PROTECTED BY QUALIFIED IMMUNITY.

In deciding the extent of personal liability to which the President may be subjected, it is initially necessary to carefully carve out those instances in which his actions have *absolute immunity*. First, those actions which have overriding national security justification deserve protection. In this respect, decisions made by the President in his capacity as commander-in-chief, particularly during a state of declared war, are of a nature deserving judicial deference for both constitutional and public policy reasons. Other ac-

tions in the realm of foreign policy taken in time of peace might also deserve protection, if it is clear that there is indeed a direct link to legitimate foreign policy which is solely within the province of the President. Another instance where absolute immunity may well be appropriate is that in which the President is faced with a true emergency situation requiring decisive action, *e.g.*, reaction to terrorist extortion. *Halperin*, 606 F.2d at 1212. Finally, the President would also be immune from liability for such clearly executive acts as signing a bill into law. It would be the duty of the judiciary to insure that these exceptions were not abused or given overly broad definition.

Acts not falling within one of the foregoing categories would receive protection to the extent they met the standards of qualified immunity outlined in *Butz*. The unique nature of the presidency could be accommodated by strict application of the "sliding scale" recognized in *Scheuer*, 416 U.S. at 247. This application would recognize that the President heads a government of unprecedented size and complexity. Accordingly, in any such case the Court must recognize that the President cannot be automatically charged with intricate knowledge of the facts supporting every decision he makes or all ramifications of his decisions. Nor would he be under obligation to consult sources other than those normally relied upon in the ordinary course of business. The complexity and pressure of presidential duties would weigh heavily in any balancing to determine what he knew or reasonably should have known.

Discovery would properly involve lower echelon officials at the early stages of litigation. Obviously, presidential business should not be interrupted for routine depositions or other discovery. Absent compelling reasons to the contrary, motions for protective orders could be granted if it were established that the desired discovery would either unduly disrupt the President's performance of his duties,

compromise national security, or violate confidential communications within the executive branch. Should the need arise, an *in camera* examination by the judge would be appropriate. *Nixon*, 418 U.S. at 714.

The President would be able to move for dismissal or summary judgment at any time after service of the complaint. Fed. R. Civ. P. 12 & 56. If the motion was premature, the court could either deny or stay the motion pending necessary discovery. Once the motion became ripe, however, the burden of proof should rest with the plaintiff to establish, "through clear and convincing evidence that [the President] failed to act with subjective or objective good faith." *Halperin*, 606 F.2d at 1215 (Gesell, J., concurring); *see generally United States v. Bridges*, 133 F. Supp. 638 (1955); IX Wigmore on Evidence § 2498 (3d ed. 1940). In determining whether the plaintiff has met this burden the Court must be especially vigilant in examining claims of subjective (i.e., malicious) bad faith. Should the plaintiff fail to meet the aforesaid burden, full assessment of costs after dismissal would be appropriate.

The procedure outlined above would require each court to exercise firm control over any case involving potential liability of the President. However, such a burden on the courts is not different in degree from that found in any truly complex litigation.

CONCLUSION

In light of the overriding importance of protecting the Constitution from knowing abuse, the courts must be clearly charged with a dual duty. Of primary importance is the duty to vindicate constitutional rights by imposing personal liability on any federal executive, including the President, who fails to meet the standards of qualified immunity as previously discussed. Grave, but secondary, im-

portance lies in protecting the President from meritless, vindictive, or insubstantial lawsuits.

The President is adequately protected by qualified immunity. Subjecting the President to personal liability in appropriate instances fulfills compelling public policy, does not violate the separation of powers doctrine, and is a valid function of the judiciary.

Respectfully submitted,

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